In The

Supreme Court of the United States

October Term, 1976

No. 77-2051

OTTO MARX, JR., JOHN V. SUMMERLIN, JR., WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Petitioners,

vs.

THE DINERS' CLUB, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on February 25, 1977, petition for a rehearing denied on May 9, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals is printed as Appendix A hereto and is reported in 550 F.2d 505. The opinion of the District Court is printed as Appendix D hereto and is reported in 400 F. Supp. 581. Set forth as Appendix B is the Order Denying Petition for Rehearing En Banc and Appendix C is the Order Denying Petition for Rehearing.

JURISDICTION

The judgment of the United States Court of Appeals was entered on February 25, 1977, petition for a rehearing denied on May 9, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Did the Court of Appeals err, in light of Rule 704 of the Federal Rules of Evidence, in ruling that expert testimony given by an attorney was so highly prejudicial as to necessitate the setting aside of a jury verdict in favor of petitioners?

STATUTE INVOLVED

Federal Rules of Evidence, Rule 704, 28 U.S.C.A. Opinion on Ultimate Issue.

> "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

STATEMENT OF THE CASE

Petitioners owned outright and beneficially all of the stock of Fugazy Travel Bureau, Inc. ("Fugazy Travel"). By agreement dated October 10, 1967 (the "Agreement"), respondent, The Diners' Club, Inc. ("Diners'") acquired the assets of Fugazy Travel for stock of Diners' and other consideration. Petitioners received restricted Diners' common stock which precluded them from reselling, distributing, or otherwise disposing of their shares in the absence of an effective registration statement under the Securities Act of 1933 or unless Diners' received from its counsel an opinion to the effect that registration was not required. Section 10.2(b) of the Agreement explicitly provided

for the registration of petitioners' restricted shares upon notice by petitioners that they desired Diners' to file a registration statement. Section 10.2(b) of the Agreement is reproduced as Note 1 to Appendix D annexed hereto (38a).

On April 16, 1969, petitioners notified Diners' that they were requesting Diners' to file with the Securities and Exchange Commission ("SEC") a registration statement with respect to their shares of Diners' common stock. It was not until late July, 1969, more than three months after petitioners requested registration, that Diners' belatedly began the preparation of the registration statement.

Trial of this action commenced on May 6, 1975, and continued over twelve trial days. At the trial petitioners offered proof that Diners' breached its contractual obligation to promptly file and use its best efforts to cause a registration statement to become effective so as to permit the sale of petitioners' restricted Diners' common stock to the public. At the trial expert testimony was offered by petitioners' witness, an attorney admitted to practice law in the State of New York.

On May 27, 1975, the case was given to the jury and on May 28, 1975 the jury returned a verdict in petitioners' favor with respect to their claim that Diners' had breached its contractual obligation to promptly file a registration statement and use its best efforts to cause the registration statement to become effective. The jury awarded petitioners damages in the aggregate amount of $533,000. Interest was added to this sum by the trial court as set forth in its opinion printed as Appendix E hereto.

On appeal to the United States Court of Appeals for the Second Circuit, the Court of Appeals reversed the judgment in favor of the petitioners on the breach of contract claim remanding this issue for a new trial.

In its opinion the Court of Appeals agreed with the trial judge that there was sufficient evidence to support the verdict. The crucial issue, the court stated, was whether, notwithstanding the general discretion allowed to trial judges respecting expert testimony, the testimony of petitioners' expert was an error of law and highly prejudicial. The Court of Appeals concluded that the leeway allowed petitioners' expert was highly prejudicial to the respondent.

Jurisdiction in the District Court was based on Section 27 of the Securities Exchange Act of 1934.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, and which decision is in conflict with other Courts of Appeals.

In adopting Rule 704 of the Federal Rules of Evidence the Advisory Committee's Note indicated that the basic approach to opinions, lay and expert, was to admit them when helpful to the trier of fact. The so called "ultimate issue" rule was specifically abolished. The basis usually assigned for the old rule, to prevent the witness from "usurping the province of the jury," was aptly characterized as "empty rhetoric." 7 Wigmore, Section 1920, p. 17.

In reversing judgment for petitioners and remanding this case for a new trial, the Court of Appeals not only overturned a jury verdict acknowledged to have been amply supported by the evidence, but also construed Rule 704 of the Federal Rules of Evidence so as to render this new legislation nugatory.

This petition will focus on the court's emasculation of Rule 704. However, it bears noting that in all other respects, the court found ample support for the jury verdict, secured after a

three-week trial. After outlining respondent's contentions, the court stated: "The jury found against Diners' on these contentions. We agree with Judge Ward that there was sufficient evidence to support the verdict."

Yet for all this, the court directed that a lengthy jury trial be undone because of the expert testimony of a lawyer-witness.

I.

The court misapprehended Rule 704 of the Federal Rules of Evidence.

Rule 704 provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." As explained in the Advisory Committee's Note, this reform was directed at a rule found to have been unduly restrictive and difficult of application, generally serving only to deprive the trier of fact of useful information.

With the stroke of a pen, and in the name of preserving the province of the trier of fact, the Court of Appeals has restored the old rule, or at least created such confusion as to the meaning of the new rule that no careful practitioner would any longer dare to rely on its terms. Petitioners' breach of contract claim involved an esoteric subject in the field of securities regulation, which was clarified by a qualified expert. The testimony was relevant, competent and material, and therefore "otherwise admissible." In testifying as to the meaning of "best efforts" in the context of a covenant to register shares, petitioners' expert was defining a word of art in securities regulation generally, in the light of his acknowledged experience. The major part of his direct testimony concerned the registration process; he testified as to the time usually required for each step toward an effective registration statement. Given his view of "best efforts" as an obligation to do everything in one's control, he also opined that

various causes advanced for delay would not be "best efforts." The expert's testimony did not usurp the function of the judge as alluded to by the court. See trial judge's opinion (36a).

In view of Rule 704, the testimony was not given in terms of hypotheticals and abstractions, but was keyed to the facts of this case. The trial judge gave careful limiting instructions. He told the jury they were free to give the testimony any weight they deemed appropriate — great weight, moderate weight, little weight or no weight. He invited cross-examination. Indeed, much of the testimony found objectionable was elicited by respondent's own counsel on cross-examination, which consumed more time than the direct.

In *United States v. Cohen,* 518 F.2d 727 (2d Cir. 1975), decided after the enactment of the new Federal Rules, it was claimed that the admission of certain expert testimony into evidence was prejudicial error; that the admission of this testimony took away from the jury its power to resolve issues of ultimate fact. In holding that the admission of such expert testimony was a proper exercise of the trial judge's discretionary power, the court stated, at page 737:

> "The trial was long and protracted, it dealt in substantial part with complex questions involving the securities laws. Expert testimony, subject to limiting instructions, was helpful to an understanding of the contested controversial issues requiring factual resolution by the triers of fact. Cf *United States v. Brown,* 511 F.2d 920, 924 (2 Cir. 1975); *United States v. Fernandez,* 480 F.2d 726, 740 (2 Cir. 1973)."

In denying Diners' motion for judgment n.o.v. the trial judge in his opinion (36a) stated:

> "Nor was it predudicial error to allow Friedman,

> an expert witness, to give his opinion as to when the registration statement should have been filed or the time within which the registration statement should have become effective or to allow him to testify in reliance on the 1970 SEC Annual Report. The admission of Friedman's expert testimony, subject to the limiting instructions given at trial, was a proper exercise of the court's discretionary power over the progress of the trial. *United States v. Cohen* Dkt. Nos. 74-2026-2027-2065 (2d Cir. June 26, 1975)."

Interestingly enough, the trial judge, Honorable Robert J. Ward, was also the trial judge in the *Cohen* case. He was, therefore, fully aware of the implications and ramifications of the *Cohen* case and how it should apply to the instant matter. We therefore have the anomalous situtation of a judge having his rulings upheld in one instance, and, while applying the same principles of law, reversed in another. As in the *Cohen* case this matter was also concerned with complex questions involving the securities laws. The disparity of results in these cases is further justification for seeking a definitive statement from this Court regarding the proper application of Rule 704.

To add further confusion to the application of Rule 704, this Court's attention is directed to *Republic Technology Fund, Inc. v. Lionel Corporation,* 345 F. Supp. 656 (S.D.N.Y. 1972) *reversed,* 438 F.2d 540 (2d Cir. 1973), *cert. denied,* 415 U.S. 918, 94 S.Ct. 1416, 39 L.Ed.2d 472 (1974). In *Republic Technology* the same expert witness gave precisely the same testimony concerning "best efforts" as he did in the instant case. (See District Court opinion in *Republic Technology Fund, Inc. v. Lionel Corporation,* 345 F. Supp. 656, 666.) The Court of Appeals reversed the decision below, not on the ground that expert testimony was improperly admitted, but becase the court below did not consider whether the delay was caused by misleading interim financials of the defendant company and, if so, whether the delay was therefore unreasonable.

According to the Court of Appeals in the instant case, the expert testimony of *Republic Technology* involved the practices of lawyers and others engaged in the securities business but the District Court opinion in that case indicates that the testimony as to "best efforts" was similar to that criticized by the court in the instant case. To the extent that such testimony was admitted, it is difficult to distinguish *Republic Technology* from the instant case because the expert was testifying about the meaning of the words "best efforts" which the Court of Appeals here said was improper.

In adopting Rule 704, and in specifically abolishing the so-called "ultimate issue" rule, the Advisory Committee's Note stated that: "The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information."

The court's decision, based on old cases, glorifies the old rule and subverts the new rule upon which petitioners relied. The court's announced rule eschews the legislative reforms and returns us to making fine-line distinctions about admissible expert testimony, in the name of preserving the province of the judge and jury, a cause which has been labelled "empty rhetoric."

II.

The Court of Appeals has decided a federal question in conflict with decisions of other Courts of Appeal on the same matter.

The opinion below is in conflict with recent cases from the Fifth, Sixth and Tenth Circuits, all of which cases hold contrary to the decision in this case. See *United States v. McCoy,* 539 F.2d 1050 (5th Cir. 1976); *Arcement v. Southern Pacific Transportation Co.,* 517 F.2d 729 (5th Cir. 1975); *United Telecommunications, Inc., v. American Television And Communications Corporation,* 536 F.2d 1310 (10th Cir. 1976); and *Johnson v. Husky Industries, Inc.,* 536 F.2d 645 (6th Cir. 1976).

In *McCoy,* objection was made to the testimony of a special agent of the FBI, the government's expert on bookmaking and the principal government witness. The agent testified that one conversation between two of the defendants was a lay-off. Error was alleged because the agent testified as to "ultimate facts", *i.e.,* that certain transactions were lay-offs, and that the testimony characterized all bets between the defendants as lay-offs rather than simple bets in support of the government's "one business theory." In allowing this testimony, the Fifth Circuit stated at page 1063 that, "admissibility of an expert's conclusion depends on the nature of the issue and the circumstances of the case, and involves a large element of judicial discretion." The court further stated that in characterizing certain transactions as lay-offs, the expert was correctly drawing "inferences from the facts which a jury would not be competent to draw." On page 1062 the court stated that defendants' objections to the testimony were jury arguments and went to the weight that the jury should have accorded the expert's testimony, stating further that these objectives were inadequate to overturn the jury's verdict. Rule 704 was one of the authorities cited by the court in its opinion.

In *Arcement,* the defendant-appellant argued that the court's refusal to allow certain testimony tainted the jury's finding that the plaintiff was not guilty of contributory negligence. The trial judge excluded certain testimony on the ground that it amounted to an opinion on an ultimate issue, *i.e.,* what a reasonable man would have done under those circumstances. Though the judgment of the District Court was affirmed, the Fifth Circuit stated at page 732, "Although evidence of this kind would generally be admissible under Rule 704 of the new Federal Rules of Evidence, we are not convinced that its exclusion here amounted to reversible error. The inferences to be drawn from the witness' testimony were manifest, if the jurors chose to draw them. They obviously did not, and it is most unlikely that the absence of a conclusory statement from the witness stand affected their judgment." Of primary interest in this case is the court's conclusion that evidence of this kind would generally be admissible under Rule 704 of the new Federal Rules of Evidence.

In *United Telecommunications,* the essence of the action is that the defendant, American Tel. & Comm. Corp. (ATC) failed to use its best efforts to register United's ATC shares which United had received in connection with a purchase agreement entered into with ATC; exactly the same factual pattern as presented to this Court in the instant case.

Upon a jury verdict in favor of United, ATC appealed to the Court of Appeals for the Tenth Circuit. Surprisingly, however, one of the errors alleged by ATC was that the trial judge committed prejudicial error by excluding expert testimony concerning "best efforts."

Expert testimony regarding the meaning of "best efforts" in underwriting agreements was allowed by ATC through testimony of its expert witness, Francis M. Wheat, a lawyer who had been an SEC Commissioner from 1964 through 1969. Though Mr. Wheat was allowed to testify as to "best efforts" in

underwriting agreements, the trial court excluded evidence regarding the meaning of the phrase in registration covenants. In its decision, the Tenth Circuit set forth the proposed testimony of Mr. Wheat which was included in ATC's offer of proof, along with the allowed testimony of Mr. Wheat about the meaning of "best efforts" in underwriting agreements. (The testimony of Mr. Wheat was similar to that offered by the expert witness in the instant case.) In both instances the Tenth Circuit found the language to be framed in general terms, such as "good faith", "specific intent to impede" and "competent and diligent" manner, and concluded that — "A competent and diligent" standard is not materially different from "best efforts." By footnote 5 on page 1317, the court alluded to *Republic Technology Fund Inc. v. Lionel Corporation, supra,* a case relied on by ATC, and concluded that the expert testimony in *Republic* was as general as the testimony offered by Mr. Wheat. The testimony admitted in Republic was given by the same expert who testified in the instant case and whose testimony was the same in both instances, as previously discussed in Point I herein.

The Tenth Circuit found, on page 1318, that "Mr. Wheat's definition of 'best efforts' both in the context of the registration covenant and in underwriting agreements was not substantially different from the common meaning of the words. His testimony would not have contributed any specific facts or conclusions to aid the jury in determining whether the covenant was breached."

The Tenth Circuit, in finding that the trial court's ruling was not prejudicial error, concluded that the testimony was properly excluded because it would not have aided the jury in their deliberations. Although the trial court incorrectly excluded Mr. Wheat's testimony on the ground that it went to the "ultimate issue", contrary to the rule of the Tenth Circuit, the exclusion was allowed on some other ground. Of particular interest is the apparent inference, on page 1316, that had this trial occurred after the effective date of the newly-promulgated

Federal Rules of Evidence, as did the trial in the instant case, the new rules would have been the standard used, and, by implication, the expert testimony would have been allowed.

So while the Tenth Circuit concluded that expert testimony as to "best efforts", although admissible, would not have been of particular aid to a jury, the Second Circuit has held in the present case that precisely the same expert testimony as to "best efforts" was highly prejudicial and warranted the reversal of a lengthy jury trial and verdict.

In *Johnson* the relatives of four deceased members of a family brought a products liability action against the manufacturer of charcoal which decedents had been using to heat a house at the time they were asphyxiated by carbon monoxide. One of the questions involved was whether the legend appearing on the package, "CAUTION FOR INDOOR USE COOK ONLY IN PROPERLY VENTILATED AREAS" was an adequate warning to users of the charcoal. Plaintiff's expert witness, a consulting engineer with expertise in combustion, testified that in his opinion the legend was not a warning because it does not alert anyone to take action for himself, herself or their family. He further testified that the legend was vague and it was misleading, and in response to a further question, answered "Sir, I found no warning labels. A warning label to me should have an impact, alert me. I don't call that a warning label."

On appeal by the defendant, Husky Industries, Inc., the Sixth Circuit concluded that no prejudicial error had been committed by the trial court in permitting the witness to testify as to his opinion regarding the adequacy of the legend carried on the bags. The testimony was sufficiently related to the areas of his expertise as to be a permissible extension thereof in the context in which it was given. Though the conclusion of the Sixth Circuit was arrived at by using the pre-existing rules of evidence, the court indicated that the new Federal Rules of

Evidence would substantiate this finding. Footnote 1 appearing at page 649 reads: "Had Article VII of the Federal Rules of Evidence (Opinions and Expert Testimony) been in effect at the time of trial there is no doubt but that the reception of such evidence would have been within the trial court's discretion."

The avowed purpose of Rule 704 was to set a standard for admissibility of expert testimony. Rule 704 adopts a rational approach in permitting opinion testimony on ultimate issues when such testimony will aid the trier of fact. This testimony allows the trier to receive the full benefit of a witness' judgment, but does not supplant or invade his province, since it is the trier of fact who ultimately determines what weight to give the opinion testimony of the witness. The Application of Rule 704 by the Second Circuit in the instant case is indirect conflict with that of the Fifth, Sixth and Tenth Circuits, as set forth in the cases discussed above. Unless a definitive statement is made by this Court on the proper application of Rule 704, the approach to opinion testimony as set forth in the Advisory Committee's Note will be thwarted.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

s/ Albert W. Lian
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APPENDIX

APPENDIX A — OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 159, 177 September Term, 1976

Argued October 18, 1976 Decided February 25, 1977

Docket No. 76-7050, 76-7069

Filed Feb. 23, 1977
Daniel Fusaro, Clerk

MARX & CO., INC., JOHN V. SUMMERLIN, JR., OTTO MARX, JR., WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Plaintiffs-Cross-Appellants,

-against-

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY,

Defendants-Cross-Appellees.

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC.,

Defendants-Appellants,

-against-

WILLIAM D. FUGAZY, LOUIS V. FUGAZY, JOHN V. SIMMERLIN, JR., OTTO MARX, JR., MARX & CO., INC. and F.T. VENTURES, INC.,

Plaintiffs-Appellees.

Appendix A

Before HAYS, ANDERSON and GURFEIN, *Circuit Judges.**

Appeal from a judgment of the United States District Court for the Southern District of New York (Ward, J.), entering judgment on a verdict for plaintiffs on a claim for breach of contract, and directing a verdict for plaintiffs on various counterclaims; cross-appeal from a directed verdict for defendants on a claim arising under the Securities Exchange Act.

Affirmed as to the Securities Act claim, and as to the counterclaims; reversed and remanded as to the contract claim.

JOSEPH J. SANTORA, New York, N.Y. (Hardee Barovick Konecky & Braun, New York, N.Y., of counsel), for *Defendants-Appellants & Cross-Appellees.*

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GURFEIN, *Circuit Judge:*

This appeal by the Diners Club, Inc. and Diners/Fugazy Travel, Inc. (collectively "Diners") arises out of a series of transactions whereby the Fugazys sold the assets of their

* Judge Hays concurred in the disposition of the appeal, but has not had an opportunity to review the opinion because of illness.

Appendix A

company, Fugazy Travel Bureau, Inc.[1] ("Fugazy Travel") to Diners Club in return for unregistered stock in the latter company. The Fugazys, plaintiffs below, allege that the defendants fraudulently induced the sale, in violation of §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, by representing that defendant Continental Corporation was about to "take over" Diners and that the failure of Diners to use its best efforts to make effective a registration of plaintiffs' shares was part of a manipulative device to induce the plaintiffs not to offer their shares for sale from October 10, 1967 to February 6, 1970.[2] The court ultimately submitted to the jury whether Diners breached *its contractual obligation* to use its best efforts to register the plaintiffs' stock.

The defendants filed various counterclaims alleging, *inter alia*, that *they* were fraudulently induced by misrepresentations of *plaintiffs* to purchase Fugazy Travel.

Jurisdiction was based solely on Section 27 of the Securities Exchange Act of 1934. While diversity jurisdiction was not alleged, there was a properly pleaded claim arising under Section 10(b) and Rule 10b-5 under the 1934 Act. During the trial the plaintiffs, without formal amendment, pressed a breach of contract claim based on a failure of Diners to use its best efforts to register the stock, which we shall treat as a pendent claim.[3]

The case was tried to a jury in the Southern District of New York before Honorable Robert J. Ward. The court directed a verdict for the defendants on the 10(b) claim and the plaintiffs appeal. The court entered judgment for the plaintiffs on a jury verdict holding Diners liable on a breach of contract claim in the amount of $533,000, plus pre-verdict interest, and finding for the plaintiffs on Diners' counterclaims and Diners appeals.

We affirm the dismissal of plaintiffs' §10(b) claim as well as

the dismissal of defendant's counterclaims. We reverse the judgment in favor of the plaintiffs for breach of contract, and remand for a new trial.

I

Under an agreement dated October 10, 1967, Diners acquired the assets of Fugazy Travel in return for unregistered Diners' stock and other consideration. Paragraph 10.2(b) of the acquisition agreement provided that, upon receipt of notification from plaintiffs that they desired registration, Diners would promptly file a registration statement for the unregistered Diners' stock held by plaintiffs and would use its best efforts to cause the registration statement to become effective.[4] Plaintiffs requested Diners to file such a registration statement in April 1969. Preparation of the registration statement did not begin until July 1969, however, and it was not filed until August 28, 1969. This registration statement never became effective; it was ultimately withdrawn, over the protest of plaintiff Marx, early in 1970.[5]

The issues of fact tendered were whether Diners had filed a registration statement promptly upon request and whether it had used its best efforts to make it effective. Plaintiffs contended that Diners should have filed on or about June 20, 1969 when its audited financials for the fiscal year ending March 31, 1969 were available and that preparatory work should have been begun immediately upon receipt of the request.[6] Diners contended that it was under no duty to file immediately because of plaintiffs' failure and refusal to fulfill certain conditions precedent to such registration rights, such as tendering one-half of the costs of registration, together with an indemnity agreement which the plaintiffs allegedly refused to give until August 24, just four days before the actual filing.[7] Diners also contended that, after the plaintiffs had formally requested the registration on April 16, 1969, the plaintiffs, during the next six

to eight weeks were advancing certain alternative proposals to avoid the necessity for filing a registration statement, and that this may have resulted in a delay in commencement of the preparation of the registration statement.[8] Diners also pointed out that it had the right, which it exercised, to include in its registration statement other securities and hence, it had to obtain information regarding the other security holders which may have resulted in a delay in filing.

With regard to whether Diners used its best efforts to make the registration effective, Diners contended that within two weeks of receipt of the SEC's comments on the registration, which was received about two months after filing, it wrote two letters in response and attended a conference with the Commission staff to resolve these comments. It also noted that William D. Fugazy himself testified that there were "monumental problems" in causing the registration statement to become effective.

The jury found against Diners on these contentions. We agree with Judge Ward that there was sufficient evidence to support the verdict. *Marx & Co., Inc. v. Diners Club, Inc.*, 400 F. Supp. 581 (S.D.N.Y. 1975). The crucial issue, sufficiently posed by objection below, is whether, notwithstanding the general discretion allowed to trial judges repecting expert testimony, *see Sanchez v. Safeway Stores, Inc.*, 451 F.2d 998 (10th Cir. 1971); *Casey v. Sears Shipping Co.*, 178 F.2d 360 (2d Cir. 1949), the admission of the testimony of a securities law expert, Stanley Friedman, was, in the circumstances, an error of law and highly prejudicial. His testimony construed the contract, as a matter of law, and includes his opinion that the defenses of Diners were unacceptable as a matter of law. In his denial of defendant's motion for a directed verdict at the close of the evidence, the judge indicated that the plaintiffs had made a *prima facie* case through Friedman.

We hold that the District Court erred in permitting Friedman, an expert witness called by plaintiffs, to give his opinion as to the legal obligations of the parties under the contract. Mr. Friedman, a lawyer and a witness not named in the pretrial order, was called as a rebuttal witness on the last day of a three-week trial.[9] Friedman was qualified as an expert in securities regulation, and therefore was competent to explain to the jury the step-by-step practices ordinarily followed by lawyers and corporations in shepherding a registration statement through the SEC. Indeed, Friedman had done so as an expert witness on previous occasions. In *Republic Technology Fund, Inc. v. Lionel Corp.*, 483 F.2d 540, 552 (2d Cir. 1973), this Circuit reversed the dismissal of a breach of contract claim that the defendant had failed to cause a registration statement to become effective within a reasonable time. 483 F.2d at 552. The issue there was whether a delay of one year before the S-1 became effective was a result of an originally misleading interim statement acompanying the S-1, in which event, "the delay may well have been unresonable." *Id.* Mr. Friedman gave expert testimony that six to eight weeks was all that should have been necessary to effectuate a registration statement because "much of the work going into it had already been done" in the preparation of a proxy solicitation filed by the surviving corporation in a merger. This testimony concerned the practices of lawyers and others engaged in the securities business.[10] Testimony concerning the ordinary practices of those engaged in the securities business is admissible under the same theory as testimony concerning the ordinary practices of physicians or concerning other trade customs: to enable the jury to evaluate the conduct of the parties against the standards of ordinary practice in the industry. *See* VII *Wigmore on Evidence* §1949, at 66 (3d ed. 1940).[11]

In the case at bar, however, witness Friedman's objectionable testimony did *not* concern only the customary practices of a trade or business. Rather, he gave his opinion as to the legal standards which he believed to be derived from the

contract and which should have governed Diners' conduct. He testified not so much as to common practice as to what was necessary "to fulfill the covenant" [of the contract]. For example, over the objection of defense counsel, he said that:

> "I construe 'best efforts' in the context of a covenant to register shares as the assumption on the part of the person who gives the covenant *an absolute, unconditional responsibility,* to set to work promptly and diligently to do everything that would have to be done to make the registration statement effective. . . ." (emphasis added)

Counsel made timely objection — "that's a legal conclusion." Similarly, the witness opined that "the best efforts obligations requires you to pursue the registration statement unless there is cause beyond your control."[12] This testimony did not concern practices in the securities business, on which Friedman was qualified as an expert, but were rather legal opinions as to the meaning of the contract terms at issue. It was testimony concerning matters outside his area of expertise. *See* Federal Rule of Evidence 702. Moreover, it would not have been possible to render this testimony admissible by qualifying Friedman as an "expert in contract law." It is not for witnesses to instruct the jury as to applicable principles of law, but for the judge. As Professor Wigmore has observed, expert testimony on law is excluded because "the tribunal does not need the witness' judgment . . . [T]he *judge* (or the jury as instructed by the judge) can determine equally well . . . . " The special legal knowledge of the judge makes the witness' testimony superfluous. VII *Wigmore on Evidence* §1952, at 81. *See* 3 *Corbin on Contracts* § 554, p. 227 (1960). ("Construction [of a contract] is always a matter of law for the Court"). *Accord, Loeb v. Hammond,* 407 F.2d 779 (7th Cir. 1969) (testimony of attorney on legal

significance of documents was properly excluded). "The question of interpretation of the contract is for the jury and the question of legal effect is for the judge. In neither case do we permit expert testimony." *Id.* at 781.[13]

Not only did Friedman construe the contract, but he also repeatedly gave his conclusions as to the legal significance of various facts adduced at trial. He testified on direct examination that, pursuant to its contractual obligation, Diners Club "should have" filed its registration on or about June 20, 1969, and not at the end of August, and therefore concluded that Diners Club did *not* use its best efforts promply to file. He asserted that it would not be a *legal* excuse (1) that Diners' employees may have been occupied in other activities, or (2) that the parties to the contract were simultaneously attempting to renegotiate the contract, — "Therefore, I don't see that it excuses performance" — or (3) that plaintiffs had failed to advance one-half of the costs of the registration.[14] He also gave it as his legal opinion that the fact that the parties were exploring alternatives was not a *legal* waiver by the plaintiffs of the requirement that Diners go forward.

Friedman was also permitted to testify, over objection, that correspondence between the litigants relating to the payment of one-half the cost of registration by the plaintiffs, including a letter to plaintiff Marx dated July 15, was irrelevant "because the registration statement would have been filed by approximately June 20th and therefore this question comes up very much after the fact." Friedman himself conceded that his opinions were based in part on his "experience and use of the English language." His conclusion that Diners Club had no *legal* excuses for non-performance was based merely on his examination of documents and correspondence, which were equally before the judge and jury. Thus Friedman's opinion testimony was superfluous. *See* VII *Wigmore on Evidence,* §

1918.[15] As Professor McCormick notes, such testimony "amounts to no more than an expression of [the witness'] general belief as to how the case should be decided." *McCormick on Evidence,* § 12 at 26-27. The admission of such testimony would give the appearance that the court was shifting to witnesses the responsibility to decide the case. *McCormick on Evidence* § 12, at 27. It is for the jury to evaluate the facts in the light of the applicable rules of law, and it is therefore erroneous for a witness to state his opinion on the law of the forum. *Loeb v. Hammond, supra.*[16] To the prompt objections that segments of Friedman's testimony were legal conclusions, the trial judge responded by refusing to strike the testimony and by telling counsel he could cross-examine. But in such circumstances, compelling the opponent to cross-examine to repair the damage is to invite disaster, for much will turn on the obstinancy of the expert, and repetition before a jury, especially on cross-examination, is likely to impress the jury. The applicable law, not being foreign law, could, in no sense, be a question of fact to be decided by the jury.

The limits of expert testimony in securities cases should not be too difficult to draw. While the able trial judge below recognized that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact," F.R. Ev. 704, he failed, in our view, sufficiently to emphasize "otherwise admissible."[17] With the growth of intricate securities litigation over the past forty years, we must be especially careful not to allow trials before juries to become battles of paid advocates posing as experts on the respective sides concerning matters of domestic law. *See La Chemise LaCoste v. Alligator Company, Inc.,* 59 F.R.D. 332, 333 (D. Del. 1973).

One final aspect of Friedman's testimony was objectionable. The expert's dogmatic view that the registration

statement should have become effective not more than 70 days after it was filed, derived not from an analysis of the facts involved in formulating this particular registration statement of this particular travel agency, but rather directly from an SEC Report statistic of the *median* time for such effectiveness, covering all sorts of companies in a variety of industries. The trial judge judicially noticed that the median figure was 70 days, but this hardly justified the categorical conclusions tendered to the jury by the witness as if that precise figure were irrefutable evidence on "reasonableness." Indeed, as we have seen, the witness boldly asserted that any questions relating to the period after the end of August 1969, when the registration "should have" become effective, were "irrelevant."

The issue for the jury was whether Diners' conduct was reasonable in the circumstances in which it found itself — not what a median statistic showed. The statistic could have served as a possible starting point for the discussion of the particular issue involved, but it should not have been given to the jury as if it were akin to a statute of limitations without regard to the particular facts. In that sense, we would grant its relevance, however slight it might be, in evaluating it with other facts. See F.R. Ev. 401. In the frame within which it was used, however, the statistic, though relevant, became an item of prejudicial overweight. See Federal Rule of Evidence 403.[18]

There is no doubt that in assessing damages, the jury found that, pursuant to Friedman's testimony, the registration statement should have become effective on August 29, for it measured the damages by the market price of the Diners' stock *on that day*, — $23.50 less the $15 price received by the Fugazys on the subsequent tender offer.[19]

The basis of expert capacity, according to Wigmore (§ 555), may "be summed up in the term 'experience.'" But experience is

hardly a qualification for construing a document for its legal effect when there is a knowledgeable gentleman in a robe whose exclusive province it is to instruct the jury on the law. The danger is that the jury may think that the "expert" in the particular branch of the law knows more than the judge — surely an inadmissible inference in our system of law.[20]

In the securities law field, as in taxation, there are areas in which the expert can testify. Of course, opinions on value are clearly within the province of the knowledgeable expert. *See, e.g., Spitzer v. Stichman,* 278 F.2d 402, 409 (2d Cir. 1960). Illustratively also, he may testify how the bid and asked price of an over-the-counter security gets into the "pink sheets," how price stabilization works, or how a stock exchange specialist operates. But these examples have their counterparts in non-admissibility. The expert, for example, may tell the jury whether he thinks the method of trading was normal, but not, in our view, whether it amounted to *illegal* manipulation under Section 9 of the Securities Act of 1933. He may explain the nature of an option contract, or of a convertible preferred stock, but we doubt that he should be allowed to testify that under an option agreement one party or the other has acted unlawfully, or that a corporation should be held liable because through a recapitalization it changed the conversion ratio and that this was a breach of contract. *See United States v. Cohen,* 518 F2d. 727, 737 (2d Cir. 1975).[21]

Recognizing that an expert may testify to an ultimate fact, and to the practices and usage of a trade, we think care must be taken lest, in the field of securities law, he be allowed to usurp the function of the judge. In our view, the practice of using experts in securities cases must not be permitted to expand to such a point, and hence we must reluctantly conclude that the leeway allowed Friedman was highly prejudicial to the appellant.

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II

Diners contends that it should have had a directed verdict because it had entered into an accord and satisfaction with the plaintiffs on August 27 providing that if the Fugazys signed and performed a written agreement acknowledging the prior Payment Condition, acknowledging their non-performance of the condition, and evidencing their undertaking to guarantee personally the obligation to pay one-half the expenses and if they delivered a proper indemnity agreement, Diners would proceed with the filing of the registration statement.

Diners raised the defense of accord only after verdict. It did not request its submission to the jury. If the issue had been presented in timely fashion, the existence of the accord would have been a question of fact for the jury. Judge Ward correctly rejected the belated argument.

III

Defendants Diners and Diners/Fugazy Travel filed three counterclaims against plaintiffs. The first counterclaim, based on Rule 10b-5, alleged that defendants had been defrauded by the plaintiffs into purchasing the assets of Fugazy Travel through misrepresentations and omissions concerning the nature and worth of those assets. The second counterclaim alleged that the Fugazys breached their common-law fiduciary duties to Diners and Diners/Fugazy Travel, arising from their capacities as officers and directors, by engaging in various self-dealing practices, including retention of an interest in Travelco, Inc., a franchise of Fugazy Travel. The third counterclaim alleged that the misrepresentations and omissions underlying the first counterclaim also constituted breaches of the Purchase Agreement which, *inter alia*, included warranties of full disclosure.

Appendix A

Evidence was presented by each side, and Judge Ward submitted the counterclaims to the jury in the form of a separate special verdict. The jury answered in favor of the plaintiffs on the counterclaims. After the verdict, the defendants moved to set it aside and the court denied the motion, as it had previously done on a motion for a directed verdict. Diners does not complain of the charge, but bases its appeal on the ground that the court erred in denying Diners' motions for a directed verdict and for judgment, Rule 50(b), on the counterclaims. Diners also complains of the exclusion of certain evidence relevant to its counterclaims. We affirm the judgment on the counterclaims.

Defendants' argument is essentially that the jury's verdict was unsupported by the evidence. It was established at trial that the Fugazys contracted in the Purchase Agreement and in their employment contracts not to engage in the travel business or to retain an interest in such a business. At the closing, the Fugazys signed affidavits that they had divested themselves of any such interest. It later appeared that, with respect to Travelco, some relationship continued to exist, through a management service contract with Travelco, pursuant to which the Fugazys were officers and directors. This was disclosed prior to the closing.

There was evidence, however, that the Fugazys had entered into an indemnity agreement with one Irwin Fruchtman, the purchaser of their interest in Travelco. The indemnity agreement provided, *inter alia*, that when a certain bank loan of Travelco (which Fruchtman had guaranteed and for which he was to be indemnified) was paid, the Fugazys would have the option to acquire 60% of the shares of Travelco for $1.00. Whether this indemnity agreement was disclosed was the subject of some dispute. As Judge Ward said in his opinion denying the Rule 50(b) motion for judgment, "The jury chose to believe plaintiffs." We can add nothing to that gem of succinctness.

Judge Ward properly left it to the jury to determine whether the option provision of the indemnity agreement was an "interest" within the meaning of the contract. Defendants did not object to the charge, nor did they request any addition thereto. There was no evidence that plaintiffs had ever exercised their option.

Thus, there was sufficient evidence to support the verdict on all the counterclaims. Defendants also contend, however, that the District Court erred in excluding evidence relevant to its first and third counterclaims, based on alleged misrepresentations and omissions. There were three pieces of evidence said to have been wrongfully excluded, as follows: (1) the circumstances surrounding a prior unrelated lawsuit entitled "Fugazy Travel Bureau, against Tower Credit Company," (2) a memorandum on the stationery of Fugazy Travel purportedly reflecting an offer to sell that company in 1966 to Pierbusseti, Inc. through one Piscatella for $250,000, plus the assumption of $350,000 in liabilities; (3) testimony by Piscatella to the effect that Mr. Fugazy was aware in 1966 of pitfalls in the franchising concept which was sold to Diners in 1967. Defendants urge that all three items were probative of the Fugazy's knowledge and belief at the time that they sold the assets in Fugazy Travel, Inc.

(1) With respect to the Tower Credit Company lawsuit, which took place five years before the Diners transaction, Judge Ward acted well within his discretion in refusing to admit the unsworn complaint filed in that litigation. Since it was unauthenticated hearsay involving a case that had been settled, and since the purpose for which Diners intended to use the unsworn complaint was avowedly to prove a prior fraud, the prejudicial effect of the unsworn complaint outweighed its probative value. Fed. R. Evid. 403.

(2) The unsigned memorandum was excluded on the basis

of lack of authentication to bind these plaintiffs. A witness, Piscatella, did testify that he received it from Summerlin and that he subsequently had a meeting with Marx. We cannot say that the judge abused his discretion in excluding the unsigned memorandum, since the development of its background and consequent anticipated rebuttal might have tended to a confusion of issues requiring a minitrial in itself.

(3) Piscatella was permitted to testify to conversations with William Fugazy concerning the operations of his company. The judge stated that he would accept proof of admissions made, even in 1966, but that he would not accept the "self-serving positive statements" of the witness that he had personally evaluated the franchising concept and that, in his opinion, it was worthless. No further admissions were offered, and the judge's ruling was correct.

IV

The District Court directed a verdict for defendants on plaintiffs' claim, under Rule 10b-5, that they were induced to sell Fugazy Travel Bureau in October 1967, on the basis of representations concerning the timing of the Continental takeover. The takeover unquestionably was effectuated in 1970; the claim is that it took place later than was allegedly represented to them. Judge Ward concluded that, as a matter of law, the defendants made no material misrepresentations prior to the closing date as to the specific date or time of the takeover; and that the plaintiffs did not rely on any representations regarding the timing of the takeover.

At trial, plaintiff Louis Fugazy testified that in October 1967 one officer of Diners Club told him that the takeover was "imminent." Plaintiff Marx testified that he was similarly told that "there would be a takeover in the foreseeable future." Plaintiff William Fugazy was told that Continental would

acquire Diners "very shortly." On their cross-appeal plaintiffs contend that these were "specific representations" concerning the timing of the takeover, which was, in fact, not consummated for almost three years.

We agree with the District Court that plaintiffs did not make out a *prima facie* case under Rule 10b-5. As Judge Ward observed, there was no evidence that defendants indicated any specific time or method by which the takeover would occur. The general statements which were made (viewing the evidence most favorably to plaintiff's) did not constitute material misrepresentations of fact.

We need not hold that plaintiffs did not rely on these statements, although it is certainly difficult to believe that plaintiffs, sophisticated investment bankers and businessmen, would have governed their conduct in reliance on such imprecise representations. Similarly, we need not hold that these alleged representations were immaterial as a matter of law, although a reasonable man would certainly be hesitant to attach great importance to such indefinite predictions of the future. *See Radiation Dynamics, Inc. v. Goldmuntz,* 464 F.2d 876 (2d Cir. 1972), *citing SEC v. Texas Gulf Sulphur Co.,* 401 F.2d 833, 849 (2d Cir.), *cert. denied sub nom. Coates v. SEC,* 394 U.S. 976 (1968); *List v. Fashion Park, Inc.,* 340 F. 2d 457 (2d Cir.), *cert. denied sub nom. List v. Lerner,* 382 U.S. 811 (1965). For the defendants never represented as a *fact* that a takeover would occur within a certain period. They merely gave their general predictions as to future events. Thus, plaintiff Summerlin testified that he had been told that there was a *probability* of a takeover. Plaintiff Marx recognized that there was only a "possibility or probability" of a takeover, and he personally participated in attempts to try to effectuate the transaction. Plaintiff William Fugazy was told that it "looked like" Continental was going to acquire Diners.[22] Given the nature of

these statements, we think the District Court properly noted the absence of any representations of specific timing. The general nature of the predictions precludes them from being representations of fact.

To establish such a misrepresentation, plaintiffs had the burden of showing that, in making these predictions as to the takeover, defendants acted with *scienter,* that is, an intent to deceive, manipulate or defraud. *Ernst & Ernst v. Hochfelder,* 96 S. Ct. 1375 at 1381 & n.2 (1976). They did not meet this burden. There was, on the contrary, evidence that they exerted substantial efforts to bring these predictions to fruition. And, of couse, it is undisputed that the takeover *was* effected in 1970.

Affirmed in part; reversed in part and remanded.

FOOTNOTES

1. The sellers included plaintiffs Marx and Co., Inc., Otto Marx, Jr., John V. Summerlin, Jr., William D. Fugazy and Louis V. Fugazy, collectively referred to as "the Fugazys."

2. Plaintiffs initially maintained that defendants also violated Rule 10b-5 by fraudulently inducing them to agree to an amendment of their employment contracts. The jury returned a verdict for the defendants on this claim and the plaintiffs do not appeal.

3. While there was no formal amendment of the complaint at trial, we think that the judge acted within his discretion in submitting the breach of contract issue to the jury, since the alternative claim was no surprise from the time of the pretrial order and plaintiffs' opening to the jury, as well as from the briefs submitted. *See* Fed. R. Civ. P. 15(b). Moreover, the special verdict form which set forth separately plaintiffs' breach of contract claim was approved by counsel for the defendant.

Appendix A

Diners maintains that the verdict was contrary to the weight of the evidence; that it was entitled to a directed verdict because its performance was excused by the Fugazys' failure to perform certain conditions precedent, *viz.*, to tender funds sufficient to reimburse Diners for one-half of all registration expenses and to deliver an indemnity agreement, *see* note 4, *infra,* that the District Court erred in refusing to apply the defense of accord and satisfaction to bar the claim; and that the testimony of a key witness for the plaintiff, a lawyer named Stanley Friedman, went beyond the proper scope of expert testimony and was prejudicial. Plaintiffs urge, by contrast, that the evidence shows that Diners neither filed a registration statement promptly nor used its best efforts to cause it to become effective and that plaintiffs' performance of its obligations under the contract was hindered by Diners Club; that the defense of accord was never tried and, therefore, properly rejected; and that the testimony of plaintiffs' expert witness was properly admitted.

4. Paragraph 10.2(b) provides:

> "If Diners shall not have filed any such registration statement subsequent to January 1, 1968 and before January 1, 1969, then, provided there are outstanding more than 25,000 shares bearing legend provided for in Section 10.1(c) hereof, the registered holders thereof (but not less than all of them) may at any time after January 1, 1969, notify Diners that they desire that Diners file such a registration statement, but only with respect to all such shares then owned by all such holders. Unless Diners shall have received an opinion from its counsel that registration is not required, or if Diners and all such registered holders, together proceeding expeditiously and in good faith after such notice, cannot obtain from the Securities and Exchange Commission a "no-

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> action" letter with respect to the sale of such shares, then Diners shall promptly file a registration statement and use its best efforts to cause such registration statement to become effective. Diners may include in such registration statement such other of its securities as it may desire. Anything to the contrary notwithstanding, Diners need not file any such registration statement until it may lawfully use its regularly prepared fiscal year end financial statements, as a part of such registration statement. The notifying holders shall pay Diners in advance an amount sufficient to reimburse Diners for one-half of all registration fees, printing costs, auditing fees (but only in excess of normal fees paid by Diners for its fiscal year end audit, legal fees and all other incidental out-of-pocket expenses incurred in connection with such registration statement)."

5. Before the registration statement was withdrawn, defendant Continental Corporation made a public tender offer for Diners stock. The Fugazys sold most of their shares to Continental at $15 a share, which was less than the market price at the time that the registration statement was filed, though more than the market price at the time of tender.

6. There was some evidence that Diners' officials considered Marx' request for registration a move to get Continental to buy him out and that one officer's reaction was "to do nothing."

7. In April, 1969, plaintiffs indicated that they were "prepared and hereby offer . . . to furnish the indemnity agreement. . . ." No formal agreement actually was signed and tendered until August, however.

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8. For example, on May 19, 1969, Marx wrote to Diners setting forth an alternative proposal so that the Fugazy's Diners shares "would not have to be registered at this time" and solicited alternative proposals in lieu of registration.

9. Our holding with regard to the inadmissibility of the substance of Friedman's testimony makes it unnecessary to consider defendant's contentions that he was a surprise witness and an improper rebuttal witness. We note, however, that the prejudicial effect of Friedman's improperly admitted testimony may well have been heightened by the fact that he testified as the last witness on the last day of a three week trial.

10. In the *Republic Technology* case Mr. Friedman gave testimony concerning the practices of people engaged in this business: that it would be the practice of a prudent lawyer to research blue sky laws prior to the issuance of securities, that it would be unprofitable business practice to cause a registration statement to become effective prior to an imminent merger, and that the ordinary practice of the SEC would be to refer the registration statement to the same SEC staff that had handled the proxy solicitations of the company. *Republic Technology, supra,* Appendix on Appeal 292, 293, 297, 303-04.

11. Of course, expert testimony concerning the practices of a particular trade or business is not admissible if, as a matter of substantive law, only the jury's common understanding and not the customary practices or usages are relevant. *Cf. Royal Loan Co. v. United States,* 154 F.2d 556 (8th Cir. 1946) (testimony of securities dealers superfluous in action to recover documentary stamp tax levied on instruments "known generally as corporate securities.")

12. Apparently Friedman gave similar testimony concerning the content of the "best efforts" obligation in *Republic Technology Fund, Inc. v. Lionel Corp., supra,*

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Appendix on Appeal at 279, 283, 591-93, a case tried to the court without a jury. The propriety of this testimony was not before the court on that appeal, however, because the district court had dismissed the complaint notwithstanding this testimony. Although defense counsel had objected to this testimony at trial, they did not appeal its admission since they had won below. In reversing the trial judge, moreover, this court did not rely on the improper testimony as the ground for its decision to remand.

13. *Kirkland v. Nisbet,* 3 Macq. Sc. App. C 766 (1859), "Evidence as to mercantile usage may be received; . . . but you cannot ask a witness what is the meaning of a written document."

14. The District Court overruled defense objections to this testimony, noting that defense counsel would have "a chance to cross-examine" Friedman. On this cross-examination Friedman amplified his view that the plaintiffs' obligation to advance costs was not a condition precedent, commenting that "Mr. Marx behaved in a reasonable way and . . . it was Diners that was behaving unreasonably. . . ." He concluded that the contractual provision for costs was "impossible of fulfillment." On cross-examination he also asserted that Diners Club was not *legally* justified in waiting for plaintiffs to furnish the indemnity agreement required under the contract.

15. *Cf. Hawkins v. Chandler,* 88 Idaho 20, 396 P.2d 123 (1969) (highway patrolman improperly testified as to reasonableness of conduct of driver of disabled wrecker); *Grismore v. Consolidated Products Co.,* 232 Iowa 328, 5 N.W.2d 646 (1942) (abolition of "ultimate issue" rule does not mean witnesses may express opinions as to whether conduct measures up to the requisite legal standard).

16. *Cf. Helms v. Sinclair Refining Co.,* 170 F.2d 289 (5th

Cir. 1948) (oil distributor's legal conclusion that he was under a contractual duty to make a shipment); *Briney v. Tri-State Mut. Green Dealers Fire Ins. Co.*, 254 Iowa 673, 117 N.W. 2d 889 (1962) (testimony by claims agent as to the legal effect of the relationship between independent adjusters and the insurance company was properly excluded).

17. "The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day." Notes of Advisory Committee on Proposed Rule 704, Fed. R. Evid.

18. In the words of Judge Friendly, "the leap required to derive any rational conclusion from the expert's data was too great to allow a jury to take." *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 912 (2d Cir. 1962).

19. Friedman misconceived the meaning of "median." The median figure simply means that half of the registration statement took less than 70 days to become effective, and that half took *more* than 70 days. The jury was never told that fully half the registration statements actually took more than 70 days. Nor was any indication given to the jury of the longest period for becoming effective, nor were any reasons given for the disparity in time between the effective date of one registration statement against another. The statistic, while admissible by a stretching of relevance, should not have been accepted as undisputed fact on which to build an expert opinion without further explanation of its meaning.

20. *Cf. Huff v. United States*, 273 F.2d 56 (5th Cir. 1959)

(testimony by government customs inspector concerning "commercial" nature of imported goods); *Warren Petroleum Co. v. Thomasson*, 268 F.2d 5 (5th Cir. 1959) (testimony by police officer as to liability for auto accident which he witnessed). We cannot ignore the tendency of juries on occasion "to decide simply according to the preponderance of numbers and of influential names. . . ." VII *Wigmore on Evidence* §1918, at 11; *see Duncan v. Mack*, 59 Ariz. 36, 122 P.2d 215 (1942).

21. In *Cohen*, we affirmed Judge Ward in permitting the Chief of the Branch of Small Issues to give her expert opinion of the reach of the concepts of "underwriter" and "materiality."

22. Plaintiffs put great emphasis on an alleged response of Victor Herd, the head of Continental Insurance to an inquiry about his takeover plans: "Well, you don't court a girl unless you are going to marry her."

But this evidence has the same infirmity as the rest of plaintiffs' case: the only fact that was represented was Continental's general intent to effectuate the acquisition.

APPENDIX B — ORDER DENING PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of May, one thousand nine hundred and seventy-seven.

DOCKET NO. 76-7050
(Filed May 9, 1977)

MARX & CO., ETC.,

Plaintiffs-Appellees-Appellants

v.

THE DINERS CLUB, INC., ETC.,

Defendants-Appellees

THE DINERS CLUB, INC., DINERS'/FUGAZY TRAVEL, INC.,

Defendant-Appellants

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the plaintiffs-appellees-cross appellants, and no active judge

or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
IRVING R. KAUFMAN,
Chief Judge

APPENDIX C — ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of May, one thousand nine hundred and seventy-seven.

DOCKET NO. 76-7050
(Filed May 9, 1977)

Present:

HON. ROBERT P. ANDERSON,

HON. PAUL R. HAYS,

HON. MURRAY I. GURFEIN,

Circuit Judges.

MARX & CO., etc.,

Plaintiffs-Appellees-Appellants

v.

THE DINERS CLUB, INC., etc.,

Defendants-Appellees

THE DINERS CLUB, INC., DINERS/FUGAZY TRAVEL, INC.,

Defendants-Appellants

Appendix C

A petition for a rehearing having been filed herein by counsel for the plaintiffs-Appellees-Appellants

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

s/ A. Daniel Fusaro
A. DANIEL FUSARO,
Clerk

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

70 Civ. 3064

MARX & CO., INC., JOHN V. SUMMERLIN, JR., and OTTO MARX, JR.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION, and THE CONTINENTAL INSURANCE COMPANY,

Defendants,

-against-

WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Third-Party Defendants.

---

72 Civ. 4324

WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., DINERS'/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY,

Defendants,

MARX & CO., INC., OTTO MARX, JR., F.T. VENTURES, INC. and JOHN V. SUMMERLIN, JR.,

Additional Defendants on the Counterclaims.

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Of Counsel

WARD, J.

Plaintiffs commenced these actions in 1970 and 1972, respectively, alleging, *inter alia,* that defendant The Diners' Club, Inc. ("Diners'") breached a contract to register certain unregistered Diners' stock held by them. In addition, plaintiffs asserted two claims alleging violations of §10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)), and Rule 10b-5 promulgated thereunder. Defendants denied plaintiffs' allegations and asserted various counterclaims. Following a trial which began on May 6, 1975 and concluded on May 28, 1975, the jury returned a verdict for plaintiffs on their contract claim and on defendants' counterclaims, awarding a total of $533,000 in damages on the former. The Court dismissed one of the plaintiffs' §10(b) claims at the end of their case and the jury returned a verdict for defendants on the other §10(b) claim.

Diners' moves pursuant to Rules 50 and 59, Fed. R. Civ. P., for judgment notwithstanding the verdict on plaintiffs' contract claim or, in the alternative, for a new trial or remittitur. In addition, defendants Diners' and Diners' World Travel, Inc., formerly known as Diners'/Fugazy Travel, Inc. ("DWT") move for judgment notwithstanding the verdict and a new trial with respect to their counterclaims.

Appendix D

Defendants base their motion for judgment notwithstanding the verdict on the grounds that plaintiffs failed to produce sufficient evidence to meet their burden of proof; that the verdict of the jury necessarily involved an erroneous determination of law; and that the evidence was overwhelmingly in their favor. A new trial is sought on the grounds that the verdict is contrary to the weight of the evidence; and that the Court made prejudicial errors in its rulings during trial, principally in permitting Stanley Friedman, a witness not identified in the pre-trial order, to testify as a rebuttal witness. A new trial or remittitur is sought on the ground that the jury made an erroneous determination of plaintiffs' damages. For the reasons set forth below, the motions are in all respects denied.

The facts, briefly, are these. Under an agreement dated October 10, 1967, Diners' acquired the assets of Fugazy Travel Bureau for unregistered Diners' stock and other consideration. Paragraph 10.2(b) of the agreement provided that Diners', upon receipt of notification from plaintiffs that they desired registration, would promptly file a registration statement for the unregistered Diners' stock held by plaintiffs and would use its best efforts to cause the registration statement to become effective.[1]

On April 16, 1969, plaintiffs wrote a letter requesting Diners' to file a registration statement with respect to their Diners' stock. Instead of directing the preparation of a registration statement, George Faunce, then president of Diners', forwarded a copy of plaintiffs' letter containing the following notation to Harold Johnson, one of its directors, and executive vice president of The Continental Insurance Company ("Continental") which held a controlling interest in Diners':

"Harold — Alfred [Bloomingdale, Diners' board chairman] asked me to send this to you

and [Victor] Herd [Continental's board chairman]. He wants to know your position —

George"

A letter dated April 24, 1969 from Johnson to Herd enclosing a copy of the April 16, 1969 request contained the following statement:

> "The attached letter, I believe, is an effort on the part of Otto Marx, Jr. to have Continental purchase his shares.
>
> "To my way of thinking *there is nothing that needs to be done at the present time.* Mr. Bloomingdale may discuss this at a later date but *my reaction is to do nothing.*" (emphasis added)

Although Diners' was requested to file a registration statement in mid-April, 1969, it is undisputed that Diners' did nothing to register the stock until late July, 1969, more than three months after receiving the letter requesting registration and almost two months after its financial statement for the fiscal year ended March 31, 1969 became available. From the foregoing, the jury could reasonably infer that Diners', with the urging and approval of Herd and Johnson, decided to do nothing and thereby avoid its obligations under paragraph 10.2(b) of the agreement.

It is clear that the motion for judgment notwithstanding the verdict on the grounds that it is against the weight of the evidence and that the verdict of the jury necessarily involved an erroneous determination of law must be denied. The standard on such a motion is the same as the standard for a directed verdict, that is, whether there was evidence from which the jury could

have properly found for plaintiff, against whom the motion is made, viewing the evidence most favorable to him and giving him the benefit of all reasonable inferences. 9 Wright and Miller, Federal Practice and Procedure §2524 (1971); *Simblest v. Maynard,* 427 F.2d 1, 4 (2d Cir. 1970). Viewed in this light, the evidence presented was certainly sufficient to permit the case to go to the jury.

Plaintiffs presented sufficient evidence to make out a prima facie case that Diners' had breached its agreement by failing to promptly file a registration statement.[2] Preparation of the registration statement did not begin until late July, 1969 and it was not filed until August 28, 1969. Although Diners' argued that it used its best efforts to cause the registration statement to become effective, it never became effective, having been withdrawn early in 1970 over the protest of plaintiff Marx.

At trial Diners' contended, and contends on these motions, that it was not responsible for the delay in filing but rather that the delay was occasioned by plaintiffs' failure to perform the conditions precedent to Diners' obligation to file. Diners' contends that its obligation to register plaintiffs' shares was subject to receipt of an amount sufficient to reimburse it for one-half of all registration expenses and delivery by plaintiffs of an indemnity agreement. Further, Diners argues that upon receipt of the registration request it had two other performance options under the agreement, either of which could be pursued in lieu of registration.

Although it is ordinarily true, as Diners' argues, that a plaintiff must prove as an element of his cause of action for breach of contract the due performance by him of all conditions precedent, *see, e.g., Marine Trust Co. of Buffalo v. Gilfillan,* 258 A.D. 296, 17 N.Y.S.2d 107 (4th Dep't 1939); 3A A. Corbin, On Contracts §628, at 16 (1960), it is equally well-settled that a

party cannot insist upon a condition precedent when he himself has caused its non-performance. *Wagner v. Derecktor,* 306 N.Y. 386, 118 N.E.2d 570 (1954). From the evidence adduced at trial, the jury could have reasonably determined that upon receipt of plaintiffs' request Diners' did nothing. It failed to elect from among the options for performance available to it under the agreement and did not request a specific amount from plaintiffs representing one-half the registration costs until July 15, 1969, well after the registration statement should have been filed. Further, the sum finally requested was considerably in excess of the reasonable expenses to be incurred. It was not until August, 1969 that Diners' even raised the question of plaintiffs providing the indemnity agreement, although in the April 16, 1969 letter plaintiffs offered to provide one in accordance with the terms of the October 10, 1967 agreement. From all these facts, the jury could have reasonably concluded that Diners' acted in bad faith and thereby prevented or hindered performance of the conditions precedent in order to avoid its obligation to file a registration statement.

Moreover, Diners' contentions were covered in the Court's charge without objection by defendants. Rule 51, Fed. R. Civ. P., specifically provides that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." A party cannot resurrect such an objection on a motion for judgment notwithstanding the verdict. *Jennings v. Boenning & Co.,* 388 F. Supp. 1294, 1303-04 (E.D. Pa. 1975); *see Cohen v. Franchard Corp.,* 478 F.2d 115 (2d Cir.), *cert. denied,* 414 U.S. 857 (1973).

Diners' also argues that the parties entered an accord on August 27, 1969, thereby precluding plaintiffs from asserting any claim based on whatever superseded obligation Diners' may have had. Rule 8(c), Fed. R. Civ. P., requires that an accord be

affirmatively pleaded, which does not appear to have been done.[3] Diners' attempt to assert this affirmative defense after trial must be rejected.

Defendants also move for a new trial on the ground that the verdict was against the weight of the evidence. The standard by which evidence is judged on a motion for a new trial is less stringent than upon a motion for judgment notwithstanding the verdict. However, determination of that motion rests within the sound discretion of the trial court to see that there is no miscarriage of justice. 6 A. Moore's Federal Practice ¶ 59.08[5] (1972). As discussed above, there was sufficient evidence to warrant submission of the case to the jury. Upon review of the probative evidence in the case, together with the inferences which the jury could reasonably have drawn therefrom, and evaluating all the testimony, the Court is persuaded that the jury's verdict was neither unsupported by the evidence, nor against "the right and justice of the case." Wright and Miller, *supra,* §2531.

Defendants raise additional claim of error, arguing that there were occurrences at the trial which were sufficiently grave and had consequences so prejudicial that these errors require a new trial. These claims revolve around the Court's permitting plaintiffs to call Stanley Friedman, a witness not named in the pre-trial order, as a rebuttal witness over defendants' objection.[4]

First, defendants contend that Friedman was a surprise witness and that they were, therefore, unable to prepare for his cross-examination. This contention is without merit. It was within the Court's discretion to permit Friedman to testify and the fact that he was not listed in the pre-trial order, standing alone, does not warrant a new trial. *See Stewart v. Meyers,* 353 F.2d 691 (7th Cir. 1965). Plaintiffs' counsel supplied defendants with Friedman's name and the subject on which he would testify as an expert witness one week before he was called to testify.

Within that week there were two full weekdays, in addition to the weekend, during which no proceedings were had in the trial. There was, thus, sufficient notice to defendants to enable them to prepare for Friedman's testimony. Moreover, at no time did defendants' counsel request a continuance to prepare for cross-examination or to obtain their own expert. In light of all the facts and circumstances, no substantial injustice resulted from permitting Friedman to testify.

Defendants next contend that although it may have been proper for Friedman to testify on plaintiffs' direct case, it was error to permit him to testify on rebuttal. It was within the discretion of the Court to permit expert testimony on rebuttal. *See Sanchez v. Safeway Stores, Inc.*, 451 F.2d 998 (10th Cir. 1971); *Casey v. Seas Shipping Co.*, 178 F.2d 360 (2d Cir. 1949). Diners' defense to plaintiffs' contract claim was that it had no duty to file the registration statement until August and that its duty was fully discharged by the actions taken. Mr. Friedman gave his opinion, in rebuttal, that a registration statement should have been filed by June 20, 1969 and become effective by the end of August, 1969. Accordingly, it was not error to permit him to testify on rebuttal.

Nor was it prejudicial error to allow Friedman, an expert witness, to give his opinion as to when the registration statement should have been filed or the time within which the registration statement should have become effective or to allow him to testify in reliance on the 1970 SEC Annual Report. The admission of Friedman's expert testimony, subject to the limiting instructions given at trial, was a proper exercise of the trial court's discretionary power over the progress of the trial. *United States v. Cohen*, Dkt. Nos. 74-2026-2027-2065 (2d Cir. June 26, 1975).

Diners' also argues that the jury made an erroneous determination of plaintiffs' damages. The Court having found that the jury's verdict was neither unsupported by the evidence

nor against "the right and justice of the case," and no objection having been taken to the Court's charge on damages, one of the alternative measures of damages being the damages awarded by the jury, this argument must be rejected.

Finally, defendants contend that the plaintiffs' verdict on their counterclaims was against the weight of the evidence. The primary claim pressed on this motion is that plaintiffs maintained an interest in Travelco, Inc. ("Travelco"), undisclosed to defendants, in violation of the October 10, 1967 agreement and their fiduciary responsibilities. At trial, the evidence produced on behalf of defendants tended to establish that plaintiffs had agreed prior to Diners' acquisition of Fugazy to indemnify the purchaser of their interest in Travelco in the event he was held liable on a guarantee of a bank loan to the corporation. Additionally, plaintiffs had an option to purchase a controlling interest in Travelco in the event the bank loan was repaid. The Fugazy's were, also, officers and directors of Travelco.

Plaintiffs denied retaining any interest in Travelco and testified that they had fully divested themselves of all interests, direct or indirect, by October 30, 1967. Evidence introduced by plaintiffs tended to establish that the terms of the Travelco transaction were disclosed to defendants. Further, they testified that the management services contract between Fugazy Travel Bureau and Travelco and the nature of the business required the Fugazy's to remain officers and directors of Travelco. They further testified, without contradiction, that they were officers and directors of many Fugazy franchises and that this was known to defendants. It is undisputed that the management services contract was disclosed to defendants at the time of Diners' acquisition of Fugazy.

The jury chose to believe plaintiffs. All the evidence was presented and counsel for defendants ably made the same

arguments to the jury as he now makes to this Court. Moreover, defendants concede that the jury was correctly charged on the law. Defendants bore the burden of persuasion and it cannot be said that the jury's verdict was without support in the evidence. The portion of defendants' motion which seeks a new trial on their counterclaims is, accordingly, denied.

The Court has considered the other arguments which defendants advance and finds defendants' contentions to be without merit. Therefore, the motions are in all respects denied.

It is so ordered.

Dated: September 23, 1975

s/ Robert J. Ward
U.S.D.J.

NOTES

1. Paragraph 10.2(b) provides:

> If Diners shall not have filed any such registration statement subsequent to January 1, 1968 and before January 1, 1969, then, provided there are outstanding more than 25,000 shares bearing legend provided for in Section 10.1(c) hereof, the registered holders thereof (but no less than all of them) may, at any time after January 1, 1969, notify Diners that they desire that Diners file such a registration statement, but only with respect to all such shares then owned by all such holders. Unless Diners shall have received an opinion from its counsel that registration is not

> required, or if Diners and all such registered holders, together proceeding expeditiously and in good faith after such notice, cannot obtain from the Securities and Exchange Commission a "no-action" letter with respect to the sale of such shares, then Diners shall promptly file a registration statement and use its best efforts to cause such registration statement to become effective. Diners may include in such registration statement such other of its securities as it may desire. Anything to the contrary notwithstanding. Diners need not file any such registration statement until it may lawfully use its regularly prepared fiscal year end financial statements, as a part of such registration statement. The notifying holders shall pay Diners in advance an amount sufficient to reimburse Diners for one-half of all registration fees, printing costs, auditing fees (but only in excess of normal fees paid by Diners for its fiscal year end audit), legal fees and all other incidental out-of-pocket expenses incurred in connection with such registration statement.

2. Diners' appears to argue that plaintiffs' contract claim was limited to Diners' failure to exercise its best efforts to cause the registration statement to become effective. It contends that the claim did not take the form in which it was submitted to the jury until plaintiffs presented their rebuttal evidence. In fact, from the outset of the trial plaintiffs contended that Diners' breached the October 10, 1967 agreement both in the failure to promptly file a registration statement and the failure to use its best efforts to cause the registration statement, ultimately filed, to become effective. In light of the numerous instances throughout the trial in which the contract claim was outlined by the plaintiffs and the Court, and Diners' agreement to the form of the special verdict submitted to the jury, Diners' belated

argument that only the failure to use "best efforts" was in issue must be deemed an afterthought.

3. See amended answer filed January 28, 1971 (70 Civ. 3064); and answer and counterclaims filed January 15, 1973 (72 Civ. 4324).

4. The trial transcript does not reflect that defendants objected to the calling of Mr. Friedman. Defendants have applied to the Court to correct the record to note their objection. It is the Court's recollection that at a conference between counsel and the Court, after the jury had left the courtroom, plaintiffs' counsel indicated his intention to call an expert witness on his rebuttal case. Counsel for defendants objected to the calling of a witness not listed in the pre-trial order. The Court, after requiring plaintiffs' counsel to name the rebuttal witness, overruled counsel's objection and indicated he could testify. Mr. Friedman testified one week later. Inasmuch as the conference does not appear to have been transcribed, the record is deemed corrected to reflect defendants' objection and the Court's ruling.

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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70 Civ. 3064

MARX & CO., INC., JOHN V. SUMMERLIN, JR., and OTTO MARX, JR.,

Plaintiffs,

-against-

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION, and THE CONTINENTAL INSURANCE COMPANY,

Defendants,

-against-

WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Third-Party Defendants.

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72 Civ. 4324

WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Plaintiffs,

-against-

Appendix E

THE DINERS' CLUB, INC., DINERS'/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY,

Defendants,

MARX & CO., INC., OTTO MARX, JR., F.T. VENTURES, INC. and JOHN V. SUMMERLIN, JR.,

Additional Defendants on the Counterclaims.

Plaintiffs Otto Marx, Jr., John V. Summerlin, Jr., William D. Fugazy and Louis V. Fugazy move for an order, pursuant to Rule 58, Fed. R. Civ. P. an N.Y.C.P.L.R. §§ 5001, 5004 (McKinney 1963 and Supp. 1975), setting the date from which interest shall be computed on the verdict rendered in their favor by the jury on May 28, 1975. Defendants oppose the motion and ask the Court to tax plaintiffs with the costs of this litigation.

The facts were fully set forth in this Court's opinion reported at 400 F. Supp. 581 (S.D.N.Y. 1975) and only those facts which are necessary to the determination of this motion are repeated here. Plaintiffs commenced these two actions in 1970 and 1972 alleging, in each complaint, two violations of §10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)), and Rule 10b-5 promulgated thereunder. Additionally, the complaints asserted pendent state claims for breach of a contract to register shares of unregistered Diners' Club, Inc. ("Diners' ") stock held by plaintiffs. The jurisdiction of this Court was invoked pursuant to §27 of the Securities Exchange Act of 1934 (15 U.S.C. §77aa). At trial, one of the two securities claims was dismissed by the Court and the jury found for defendants on the second. However, plaintiffs recovered on the pendent state law breach of contract claims.

Appendix E

Plaintiffs now seek to have the date from which pre-verdict interest shall accrue set by the Court. They argue that under state law they are entitled to pre-verdict interest computed from the earliest ascertainable date their contract causes of action existed as a matter of right.

Defendants argue that state law does not apply in actions where jurisdiction is founded upon a federal ground. Their argument is premised on the assertion that the doctrine of *Erie Railroad v. Tompkins,* 304 U.S. 64 (1938) requires the application of state law only in cases within the diversity jurisdiction of the federal courts. This contention cannot be sustained. Whether state law is to be applied depends upon the nature of the issue before the federal court and not the basis for its jurisdiction. *Maternally Yours, Inc. v. Your Maternity Shop, Inc.,* 234 F.2d 538, 540 n.1 (2d Cir. 1956); 1A J. Moore, *Federal Practice* ¶ .305[3] (1974). As the court in *Erie* stated:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." 304 U.S. at 78.

Thus, it is the source of the right sued upon which is determinative of whether state law should be applied. *Maternally Yours, Inc. v. Your Maternity Shop, Inc., supra.* In *Mintz v. Allen,* 254 F. Supp. 1012 (S.D.N.Y. 1966), the court was presented with a contention similar to that urged by the defendants. The court held that state law should be applied to pendent state law claims in a shareholders' derivative action where jurisdiction was predicated upon the Investment Company Act of 1940.

In the instant actions, the contract claims arise solely under state law. The claims were submitted to the jury as controlled by state law. Indeed, even defendants in their post-trial motions

treated the contract claims as controlled by state law. Accordingly, the Court holds that state law applies to the question of pre-verdict interest on the pendent contract claims under *Erie* as it would had the claims arisen pursuant to the Court's diversity jurisdiction. *Julien J. Studley, Inc. v. Gulf Oil Corp.*, 425 F.2d 947 (2d Cir. 1969); *St. Clair v. Eastern Airlines, Inc.*, 302 F. 2d 477 (2d Cir. 1962); *Earnest v. Donald Deskey Associates, Inc.*, 312 F. Supp. 1312 (S.D.N.Y. 1970).

Under New York law, the successful plaintiff in an action for breach of contract is entitled as of right to interest computed from the earliest ascertainable date the cause of action existed. N.Y.C.P.L.R. §5001; 5 Weinstein, Korn, Miller, *New York Civil Practice*, ¶¶ 5001.04, .10 (1974). The statute provides for submitting to the jury the question of the date from which interest shall be calculated and, if the jury is discharged without specifying the date, the court shall fix the date. N.Y.C.P.L.R. §5001(c). Plaintiffs contend that the earliest date the causes of action existed was September 1, 1969. Defendants contend the earliest ascertainable date the causes of action can be said to exist is the commencement of the trial in May, 1975.

In fixing the date under §5001(c), the Court must determine what damages the jury's award represented. *Julien J. Studley, Inc. v. Gulf Oil. Corp., supra; Earnest v. Donald Deskey Associates, Inc., supra.* In effect, the court must ascertain the earliest date the damages were sustained based upon the jury's award. *See Temple Beth Sholom v. E.M. Fitzsimmons and Associates, Inc.*, 42 A.D.2d 739, 345 N.Y.S.2d 680 (2d Dep't 1973). When it is impossible to ascertain the earliest date represented by the jury's award, pre-verdict interest is computed from the commencement of the action. *See, e.g., Earnest v. Donald Deskey Associates, Inc., supra; Temple Beth Sholom v. E.M. Fitzsimmons and Associates, Inc., supra.* Consequently, the latest possible dates from which interest should be computed are 1970 and 1972, respectively. Defendants argument that

interest should be computed from the commencement of the trial must, therefore, be rejected.

However, the jury's award in the instant case clearly represents damages sustained prior to the commencement of these actions. Throughout the trial plaintiffs contended that had Diners' not breached its agreement to register their stock, the stock would have been effectively registered by late August, 1969. Defendants vehemently disputed this contention. The jury found for plaintiffs and awarded damages representing the difference between what plaintiffs received for their stock and what they would have been able to receive had the stock been registered by August, 1969. Accordingly, the earliest ascertainable date plaintiffs' contract causes of action existed is September 2, 1969. Indeed, defendants' argument to the contrary represents an attempt to relitigate the question determined adversely to them by the jury and by this Court on their motion for a new trial or remittitur.

The next question is the rate at which interest should be computed. N.Y.C.P.L.R. §5004, which became effective September 1, 1972, prescribes the rate of interest as 6%. Accordingly, interest for the period subsequent to September 1, 1972 shall be computed at 6%. The difficulty arises with respect to the applicable rate of interest between September, 1969 and September, 1972. Plaintiffs contend that during this period interest should be calculated at 7½%. Defendants apparently do not dispute that this was the rate during that period. Nonetheless, the Court has examined the available New York law and determined that §5004 is not retroactive and that interest prior to September, 1972 should be computed at 7½%. *7 Doyer Street Realty Corp. v. The Great Cathay Development Corp.*, 43 A.D.2d 476, 352 N.Y.S.2d 483 (1st Dep't 1974); *Rachlin & Co. v. Tra-Mar, Inc.*, 33 A.D.2d 370, 308 N.Y.S.2d 153 (1st Dep't 1970); *Yamamoto v. Costello*, 73 Misc.2d 592, 342

N.Y.S.2d 33 (Sup. Ct. 1973); 5 Weinstein, Korn and Miller, ¶ 5004.01 (1974).

Accordingly, the Court holds that plaintiffs are entitled to interest on the jury's award computed from September 2, 1969 at the rate of 7½% up to and including August 31, 1972 and at 6% thereafter.

Finally, defendants seek to recover their costs pursuant to Rule 54(d), Fed. R. Civ. P. Recognizing that ordinarily plaintiffs, who recover a judgment, would, also, recover their costs, defendants appeal to the Court's discretion to award them costs.

Under Rule 54(d), the court has discretion in awarding costs. *See Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964); *McDonnell v. American Leduc Petroleums, Ltd.*, 456 F.2d 1170 (2d Cir. 1972). The Court, in the exercise of its discretion, has determined that with the exception of defendants The Continental Corporation and The Continental Insurance Corporation ("the Continental companies"), each party should bear its own costs. The litigation was protracted, involving numerous claims and counter-claims. Except for the Continental companies, no party was completely successful. In light of all the facts and circumstances, costs are awarded the Continental companies. Each of the other parties shall bear its own costs.

Settle judgment on notice.

Dated: December 17, 1975

s/ Robert J. Ward
U.S.D.J.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

77-205

OTTO MARX, JR., JOHN V. SUMMERLIN, JR.,
WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

Petitioners,

vs.

THE DINERS' CLUB, INC.,

Respondent.

BRIEF OF RESPONDENT THE DINERS' CLUB, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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Respondent.

BRIEF OF RESPONDENT THE DINERS' CLUB, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent respectfully suggests that a Writ of Certiorari in the instant case is neither necessary nor appropriate for the reasons stated below.

Questions Presented

The threshold question is whether the Petition should be considered for review at all, since it brings up for review only one of the two grounds on which the Court of Appeals ordered a new trial.

The remaining question is whether the second ground of the Court of Appeals' decision ordering a new trial because of the improper admission of testimony construing legal obligations under the contract in suit, opining on matters of law, and thereby usurping the role of the District Court to instruct the jury as to the law, presents a federal question or any question of sufficient importance to warrant review by this Court.

Statute Involved

Rule 704 is not involved in the situation at bar, nor did Petitioners raise Rule 704 as an issue in their appeal to the Court of Appeals.*

Statement of the Case

On the last day of a three week jury trial, Petitioners presented a rebuttal witness, one Stanley Friedman, to testify in support of Petitioners' claim for breach of contract, which was pendent to two 10b-5 claims asserted by Petitioners.** One of Petitioners' 10b-5 claims was dismissed at the close of their case; the other was decided against them by the jury. On the contract claim the jury returned a verdict of $533,000.

The Court of Appeals, after careful review of the factually complex 1,600 page Appendix, ordered a new trial on the contract claim based on a) errors in permitting Mr. Friedman to testify as to the law and improperly to construe the parties' legal obligations under the contract (P. 4a-8a), and b) the improper use the District Court permitted to be made of a statistic (P. 9a-10a).* The Petition generally discusses, although mischaracterizes, the first ground of the Court of Appeals' ruling. However, the Petition presents no discussion whatsoever on the statistic, and accordingly does not bring that issue up for review.

Several other valid grounds for a new trial had been presented to the Court but, in view of its decision to order a new trial as described above, the Court did not determine all the additional grounds on the merits.**

In granting a new trial, the Court of Appeals recited the errors committed by the District Court, noting, *inter alia,* that:

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* Rule 704 of the Federal Rules of Evidence ("Rule 704") was never cited by the District Court in support of its ruling on Friedman's testimony, and was cited only in passing by the Court of Appeals, which held it inapplicable (P. 9a). The letter "P", followed by a number, refers to pages in the Petition and its Appendix.

** The salient facts relating to the various claims and counterclaims presented at the trial are set forth in the opinion of the Court of Appeals, appearing at pages 1a-23a in Appendix A to the Petition for Certiorari (P. 1a-23a). At most, 2 days of the three week trial were devoted to the pendent claim for breach of contract. The contract claim had never been pleaded, but was converted by Petitioners into a separate claim only at the trial, after 5 years of litigation.

* A 70 day median for the effectiveness of registration statements filed in 1970 (P. 10a; 22a, n. 19).

** Respondent had urged that it was entitled to a directed verdict because its performance under the contract was excused by Petitioners' failure to perform conditions precedent (P. 18a, n. 3). Respondent had also urged that Friedman was a surprise witness and improper rebuttal witness. Although it didn't reach these issues, the Court of Appeals did note that the timing of Friedman's testimony was a factor which may well have heightened its prejudicial effect (P. 20a, n. 9). The Court of Appeals also took note of the District Court's comment that Petitioners had made out a *prima facie* case through Mr. Friedman (P. 5a), a "rebuttal" witness who had not been listed in the pre-trial order (P. 6a).

(1) "[Mr. Friedman's] testimony construed the contract, as a matter of law, and includes his opinion that the defenses of [Respondent] Diners were unacceptable as a matter of law" (P. 5a);

(2) ". . . witness Friedman's objectionable testimony did *not* concern only the customary practices of a trade or business. Rather he gave his opinion as to the legal standards which he believed to be derived from the contract and which should have governed Diners' conduct." (P. 6a-7a) (Emphasis the Court's).

The law traditionally prohibiting such testimony was summarized by the Court of Appeals as follows:

"It is not for witnesses to instruct the jury as to applicable principles of law, but for the judge." (P. 7a).

• • •

"His conclusion that [Respondent] Diners Club had no *legal* excuses for non-performance was based merely on his examination of documents and correspondence, which were equally before the judge and jury. Thus Friedman's opinion testimony was superfluous." (P. 8a) (Emphasis the Court's).

• • •

"It is for the jury to evaluate the facts in the light of the applicable rules of law, and it is therefore erroneous for a witness to state his opinion on the law of the forum." (P. 9a) (Footnote omitted).

Reasons for Denying the Writ

Since the Petition does not seek to challenge the second basis for the Court of Appeals' decision—the use of the 70 day statistic—which alone requires a new trial, there is no reason for this Court to grant certiorari.

As to the issue that is obscurely raised by the Petition,* not only did the Court of Appeals correctly decide that issue, but the bases for its decision do not present an issue which warrants review by this Court.

Rule 704 neither applies to this issue, nor was "emasculated" by the Court of Appeals, as suggested by Petitioners (P. 4). Rule 704 deals with testimony concerning ultimate issues to be decided by the trier of fact; Friedman's testimony expressed his opinion on the law.**

Furthermore, for Rule 704 to apply, the testimony must be "otherwise admissible." Testimony construing legal obligations under a contract has never been held admissible. Moreover, since Petitioners' claim is a pendent claim

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* A comparison of the Petition and the opinion of the Court of Appeals reveals that the Petition fails to deal accurately and clearly with the real bases for the Court of Appeals' decision. The Petition should be denied for that reason alone. Sup. Ct. R. 23 (4).

** Indeed, his testimony on and knowledge of the facts was negligible:

> "Friedman himself conceded that his opinions were based in part on his 'experience and use of the English language.' His conclusion that Diners Club had no *legal* excuses for nonperformance was based merely on his examination of documents and correspondence, which were equally before the judge and jury. Thus Friedman's opinion testimony was superfluous." (P. 8a) (Emphasis the Court's)

for breach of contract under New York law,* the New York parol evidence rule bars such testimony. There is, therefore, no federal question at all for review by this Court, much less one presenting special and important reasons warranting the grant of certiorari (Sup. Ct. R. 19).

Finally, Petitioners' suggestion that the Court of Appeals decision is in "conflict" with decisions from other Circuits "on the same matter" is simply not correct.

I.

The second error found by the Court of Appeals, not brought up for review by the Petition for Certiorari, requires a new trial in any event.

The Court of Appeals found two independent errors warranting a new trial—Friedman's opinion on the law and construction of the contract (P. 4a-8a), and the improper use of the 70 day statistic (P. 9a-10a):

> "In the frame within which it was used, however, the statistic, though relevant, became an item of prejudicial overweight. See Federal Rule of Evidence 403." (P. 10a) (Footnote omitted).

The Petition is silent with respect to the Court of Appeals' ruling on this latter issue, thus conceding its correctness. Since that ruling is not brought up for review, Sup. Ct. R. 23 (1) (c); *F.D. Rich Co.* v. *United States,* 417 U.S. 116, 121 n. 6 (1974), and since a new trial is required because of that ruling, there is no reason for this Court to grant certiorari to review the other basis for a new trial. *See, Andrews* v. *Louisville & Nashville R. Co.,* 406

* P. 43a.

U.S. 320, 324-25 (1972); *Namet* v. *United States,* 373 U.S. 179, 190 (1963). *Cf. Local No. 8-6* v. *Missouri,* 361 U.S. 363 (1960).

Moreover, even if there were only one ground for a new trial which was brought up for review, it would be inappropriate for certiorari to be granted, since no final judgment has yet been entered because of the new trial. *See, Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R. Co.,* 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916).

II.

The Court of Appeals' ruling that it was error to permit Mr. Friedman to construe the contract and testify as to the law was correct, and is not at odds with Rule 704, which does not apply to this case.

A. The Court of Appeals' Decision was Correct

The black letter law, too well established to admit of dispute, is that the judge, and not a witness, should instruct the jury on what the law is; that "'you cannot ask a witness what is the meaning of a written document.'" (P. 21a, n. 13 quoting from *Kirkland* v. *Nisbet,* 3 Marcq. Sc. App. C 766 (1859)), and that "[i]t is for the jury to evaluate the facts in the light of the applicable rules of law, and it is therefore erroneous for a witness to state his opinion on the law of the forum." (P. 9a). The Petition is silent on the reasoning of the Court of Appeals, and wholly fails to come to grips with the fundamental issues that the Court of Appeals in fact decided. For that reason alone, the Petition should be denied. *See,* Sup. Ct. R. 23(4). *Cf. Belcher* v. *Stengel,* 429 U.S. 118 (1976).

The Court of Appeals cited ample precedent in support of its ruling (See, P. 6a-9a), and no authority to the contrary has ever been cited. As the Court of Appeals noted, no witness, expert or otherwise, may construe a contract or offer his opinion on the legal obligations of parties under a contract (*Id.*).* To do so usurps the function of the trial judge. As a commentator has stated on the subject:

> "A witness cannot be allowed to give an opinion on a question of law, and this upon considerations quite different from the supposed objection to opinions on ultimate facts. . . . There being only one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who of course is the judge. This may rest upon a legal fiction, but one more vital to the system and no more contrived than, say, the presumption of innocence. To allow anyone other than the judge to state the law would violate the basic concept. Reducing the proposition to a more practical level, it would be a waste of time if witnesses or counsel should duplicate the judge's statement of the law, and it would intolerably confound the jury to have it stated differently." Stoebuck, *Opinions on Ultimate Facts: Status, Trends, And A Note of Caution,* 41 Denver L.C.J. 226, 237 (1964) (Footnote omitted).

* The prejudicial impact of such testimony is particularly severe when the witness' stature is elevated in the eyes of the jury by the labels of lawyer and expert.

B. Rule 704 is Inapplicable

Rule 704, an afterthought of Petitioners,* has nothing to do with testimony that purports to instruct the jury on the law of the forum or to construe a contract. The Court of Appeals squarely resolved the distinction between testimony as to ultimate facts and testimony on the law, holding that:

> "The applicable law, not being foreign law, *could, in no sense, be a question of fact to be decided by the jury.*" (P. 9a) (Emphasis added)
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> • • •
>
> "Recognizing that an expert may testify to an ultimate fact, . . . we think care must be taken lest, in the field of securities law, he be allowed to usurp the function of the judge." (P. 11a).

See also Huff v. *United States,* 273 F.2d 56, 61 (5th Cir. 1959). (cited at P. 22a, n. 20).

Moreover, to be permissible under Rule 704, testimony must, as the Court of Appeals pointed out, be "otherwise admissible" (P. 9a), which Friedman's testimony clearly is not. As the Advisory Committee noted, Rule 704 "does not lower the bars so as to admit all opinions," and Rules 701, 702 and 403 function to bar

> "opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, 'Did T have capacity to make a will?' would

* Rule 704 heretofore was not of sufficient significance to warrant an appearance in Petitioners' Brief to the Court of Appeals.

be excluded . . ." Notes of Advisory Committee on Proposed Rules of Evidence, 51 F.R.D. 315, 405-06 (1971).*

Friedman's testimony was not "otherwise admissible" for yet another reason. Under the law of New York, which applies to this pendent claim, *Smith* v. *Bear,* 237 F.2d 79 (2d Cir. 1956), parol evidence, such as the testimony of Mr. Friedman, which purports to vary the terms of a written contract, is not admissible. *Leumi-Financial Corp.* v. *Richter,* 17 N.Y.2d 166, 269 N.Y.S.2d 409, 216 N.E.2d 579 (1966). Thus, this case does not present any federal issue, much less one of sufficient importance to warrant the grant of certiorari. *See, e.g., Wolf* v. *Weinstein,* 372 U.S. 633, 636 (1963).

Petitioners' reliance upon *United States* v. *Cohen,* 518 F.2d 727 (2d Cir.), *cert. denied,* 423 U.S. 926 (1975) and *Republic Technology Fund, Inc.* v. *Lionel Corporation,* 345 F. Supp. 656 (S.D.N.Y. 1972), *rev'd in part,* 483 F.2d 540 (2d Cir. 1973), *cert. denied,* 415 U.S. 918 (1974), both decided by the Second Circuit, is wholly misplaced. Both of these cases were discussed and correctly distinguished by the Court of Appeals in the decision below (P. 6a; 11a; 20a, n. 10, n. 12; 23a, n. 21).

The Petition does not fairly summarize what it was about Mr. Friedman's testimony that the Court of Appeals found to be in error, but instead mischaracterizes the thrust of Friedman's testimony so as to attempt to fit it within Rule 704. The Court of Appeals acknowledged that Mr. Friedman,

> "qualified as an expert in securities regulation, . . . was competent to explain to the jury the step-by-

* The Court of Appeals itself quoted this portion of the Advisory Committee Note. (P. 22a, n. 17).

> step practices ordinarily followed by lawyers and corporations in shepherding a registration statement through SEC." (P. 6a).

The Court of Appeals went on to say, however, that:

> "In the case at bar, however, witness Friedman's objectionable testimony did *not* concern only the customary practices of a trade or business. Rather, he gave his opinion as to the legal standards which he believed to be derived from the contract and which should have governed Diners' conduct." (Emphasis the Court's) (P. 6a-7a).

Petitioners completely miss the import of the Court of Appeals' decision when they suggest that Rule 704 was "emasculated" (P. 4). Rule 704 has nothing to do with testimony on the *law,* which was the error found by the Second Circuit in Friedman's testimony. Rule 704 deals with "ultimate issue" testimony, which the Second Circuit Court of Appeals has long permitted, well *before* the adoption of Rule 704. *See, e.g., Carlson* v. *Chisholm-Moore Hoist Corp.,* 281 F.2d 766, 772 (2d Cir.), *cert. denied,* 364 U.S. 883 (1960); *United States* v. *Fernandez,* 480 F.2d 726, 740 (2d Cir. 1973) (citing the then unadopted Rule 704). The decision below does not change Rule 704 or the prior decisions of the Second Circuit on ultimate issue testimony, but merely reaffirms the fundamental rule barring testimony by a witness on the law.

III.

The opinion below is not in conflict with decisions of other Courts of Appeal on the same matter.

By mischaracterizing both the opinions of various Circuit Courts and the opinion below, Petitioners have attempted to mislead this Court into perceiving a conflict among the Circuits where none exists. The cases cited by Petitioners are both factually distinguishable from the instant case, and did not involve Rule 704, except by way of dicta.

In *United States* v. *McCoy,* 539 F.2d 1050 (5th Cir. 1976) (P. 9), the court held there was no abuse of discretion in allowing the expert to draw "inferences from the facts which a jury would not be competent to draw" 539 F.2d at 1063. Such holding is totally in accord with that of the Court below which rejected Friedman's testimony because, *inter alia,* it related to conclusions which the jury was equally competent to draw (P. 8a). Moreover, it is clear that the application of Rule 704 was not even in issue in *McCoy* except as a matter of dictum in accord with the decision below. 539 F.2d at 1063.

In *Arcement* v. *Southern Pacific Transportation Co.,* 517 F.2d 729 (5th Cir. 1975) (P. 10), the Fifth Circuit affirmed the Trial Court's exclusion of certain testimony (far different from Friedman's), but stated in dictum that under Rule 704 an opinion on an ultimate issue would be generally admissible, a statement totally in accord with that of the Court below.

In *Johnson* v. *Husky Industries, Inc.,* 536 F.2d 645 (6th Cir. 1976), a case not involving Rule 704, the Court allowed certain testimony since, "in the context in which it was given", it was "sufficiently related to the areas of his expertise as to be a permissible extension thereof" 536 F.2d

at 649-50. In the instant case the Court, while recognizing the discretion of the trial judge, ruled that Friedman's testimony concerned "matters outside his area of expertise" (P. 7a), and that, in any event, testimony as to matters of law can never be the subject of expert testimony (P. 6a-9a).

Petitioners' reliance on *United Telecommunications, Inc.* v. *American Television and Communications Corp.,* 536 F. 2d 1310 (10th Cir. 1976) is similarly misplaced. While that case did not involve Rule 704, but rather Colorado law, the result reached, and that Court's reasoning, are very much in accord with the decision below. The Court there upheld the exclusion of expert testimony which was superfluous:

> ". . . Mr. Wheat's definition of 'best efforts' . . . was not substantially different from the common meaning of the words. His testimony would not have contributed any specific facts or conclusions to aid the jury in determining whether the covenant was breached." 536 F.2d at 1318.

The cases cited by Petitioners thus cannot provide the basis for a claim of conflict among the circuits. Those cases involve different factual circumstances. Moreover, none of them held that a witness can testify on the law. There is thus no conflict.

Conclusion

For the reasons stated above it is respectfully submitted that the Petition For a Writ of Certiorari should be denied in all respects, and that the case should proceed to a new trial, as ordered by the Court of Appeals.

Respectfully submitted,

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